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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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JOHN A. GEDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

BEST COPY AVAILABLE

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Solicitor General,
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Petitioner contends that the trial judge's order not to discuss his testimony with anyone during an overnight recess deprived him of the assistance of counsel and that hearsay testimony, tending to show his predisposition to commit the offenses with which he had been charged, was improperly adduced by the government to rebut his entrapment defense.

After a jury trial in the United States District Court for the Middle District of Florida, petitioner and co-defendant Michael Fink were convicted of conspiracy to import and illegal importation of marihuana into the United States, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 371, and possession of such marihuana, in violation of 21 U.S.C. 841(a)(1).[1/] Petitioner was sentenced to concurrent three-year terms of imprisonment on each count. The court of appeals affirmed (502 F. 2d 1; Pet. App.).

The evidence at trial showed that petitioner, co-defendant Fink and Randy Kilgore entered into an agreement in September 1972 to smuggle marihuana into the United States from South America. Petitioner agreed to provide a South American contact, Fink agreed to obtain financial backing for the trip and the purchase and Kilgore agreed to arrange for a pilot to fly the marihuana from South America to the United States. Each carried out his respective part of the conspiracy, arranging for the participation of several additional conspirators to assist in the undertaking. In November 1972, petitioner and the pilot flew in a rented plane to Columbia, South America, where they picked up a load of marihuana. They then returned, via the Bahamas, to Florida. Federal agents subsequently seized the marihuana and arrested all of the participants in the conspiracy (Pet. App. A3-A4).

1. Petitioner first contends that the trial court deprived him of his Sixth Amendment right to the assistance of counsel when it directed him not to discuss his testimony with anyone during an overnight recess.

Petitioner took the stand at trial in his own defense. Upon completion of his direct examination at 4:55 p.m., the government moved for a recess. Before declaring a recess to the following day, and out of the presence of the jury, the court instructed petitioner "not to discuss your testimony in this case with anyone until you are back here tomorrow morning at 9:30 for the purpose of being cross-examined" (Pet. App. A8).

1/ Co-defendant Fink has also petitioned for a writ of certiorari, contending that the government's use of hearsay to rebut his entrapment defense was improper. Fink's petition is presently pending before this Court. Fink v. United States, No. 74-820.

Petitioner did not, either before the court of appeals or in his petition to this Court, point to any actual prejudice caused by the disputed instruction -- contending instead that prejudice must be assumed whenever a defendant has been denied his constitutional right to the assistance of counsel (Pet. 4). It should be noted, however, that petitioner was represented by counsel throughout his trial. The court's instruction simply removed petitioner's opportunity to confer with his counsel between his direct and cross-examination concerning his answers to questions to be asked by the government. [2/] This opportunity arose only because direct examination of petitioner did not conclude until the end of the day, and cross-examination was consequently deferred to the following day. Any contention that a defendant has an absolute right to have a recess declared in order to confer with counsel, after he has begun testifying and before examination of him has been completed, would of course be unsupportable.

Even if it is assumed that the disputed instruction was error, we submit that the court of appeals nevertheless correctly refused to reverse petitioner's conviction on that basis. After having considered the factual circumstances underlying petitioner's contention in light of the decisions rendered in the only two cases that have involved a similar contention -- United States v. Venuto, 187 F. 2d 577 (C.A. 3), and United States v. Leighton, 386 F. 2d 822 (C.A. 2) -- the court of appeals

2/ The court accompanied its instruction in the present case with a promise to declare a recess after cross and redirect examination had been completed in order to permit consultation (Tr. 1153).

held that the error was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18. According to the court of appeals (Pet. App. A9):

> [b]ecause, like the Second Circuit, "we can discern no actual harm * * * and are convinced there was none," we must reject [petitioner's] contention that [the court's error] constitutes reversible error.

2. Petitioner also argues that hearsay testimony, tending to show his predisposition to commit the offenses with which he had been charged, was improperly adduced by the government to rebut his entrapment defense.

At trial, the government sought to rebut the entrapment defense relied upon by petitioner and co-defendant Fink by general reputation testimony tending to prove their predisposition to engage in narcotics trafficking. Charles Hudson, a federal narcotics agent, testified that he had talked to confidential informants and had examined intelligence files in the Hillsborough County, Florida, sheriff's office and had thereby ascertained that petitioner had a reputation in his community for drug smuggling and distributing. The court denied petitioner's request to see the files upon which Hudson's testimony was based, stating that under the circumstances it would have been contrary to the rules of evidence for the government or the defendants to submit evidence of specific past acts in an effort to prove or disprove the predisposition of the defendants to commit the offenses with which they had been charged (Pet. App. A5).

Testimony concerning a defendant's reputation in the community, such as that offered by the government in the present case, is admissible to rebut the defense of entrapment as part of the "appropriate and searching inquiry" authorized

by Sorrells v. United States, 287 U.S. 435, 451, and Sherman v. United States, 356 U.S. 369, 372-373. As stated by the court of appeals, "once the defense of entrapment is raised the government may introduce hearsay testimony concerning the defendant's predisposition to commit the crime and the reasonableness of the conduct by the government agents" (Pet. App. A5). Moreover, the court's refusal to permit the defense to question Hudson about the specific events or activities that gave rise to petitioner's public image was well within the court's discretion. Character reputation is established by what one has heard in the community about the person in question, rather than by actual events or activities. See Michelson v. United States, 335 U.S. 469.

There is no conflict among the circuits on this issue. The cases upon which petitioner relies are inapplicable, since they deal with evidence of specific past acts offered to rebut an entrapment defense, rather than with evidence of general reputation, as in this case.

There was ample evidence, moreover, that despite the pilot's facilitating the present scheme, petitioner and his co-conspirators were fully predisposed to carry it out even without such aid. United States v. Russell, 411 U.S. 423, 435. The scheme commenced in 1972, when petitioner agreed to arrange for access to a supply of marihuana in South America (Tr. 56-57). Before a pilot was found, petitioner and Fink met with financial backers to discuss the cost of acquiring the marihuana and the eventual profit from distributing it (Tr. 61). Fink thereafter hired the pilot. As one witness testified (Tr. 309):

> the trip was going to go off, whether there was Mr. Butler [the pilot] or not * * * [T]hey were going to get a pilot, and if it was not Mr. Butler then they were going to have to * * * get one someplace else * * * John Geders [petitioner] made a few phone calls, when I was at his house, inquiring about a pilot * * *.

It is thus apparent that petitioner's criminal design was his own, not one implemented by the government. United States v. Russell, supra, 411 U.S. at 436.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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